No. 95-1845

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THURGOOD MARSHALL LEGAL SOCIETY AND
BLACK PRE-LAW ASSOCIATION,
Petitioners,

v.

CHERYL J. HOPWOOD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF OF RESPONDENTS HOPWOOD AND CARVELL IN OPPOSITION TO CERTIORARI

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Respondents labor mightily but, we believe, ultimately unsuccessfully, to cloud the issues arising from the approach taken by the court of appeals to the question of intervention by African-American students in this "reverse discrimination" case. Only a few points require reply.

1. ***Jurisdiction of this Court.*** Respondents confuse the issue of this Court's *jurisdiction* to review a judgment with the scope of the questions it may consider once it has determined to grant review. The argument that the Court lacks jurisdiction to review the court of appeals' 1994 ruling affirming the district court's first denial of intervention, because no

petition seeking review was filed within ninety days (as required by 28 U.S.C. § 2101(c)), is beside the point. As explicitly stated at p. 1 of the Petition, the Thurgood Marshall Legal Society and the Black Pre-Law Association have requested that this Court review only the March 18, 1996 judgment of the court of appeals. Their Petition was unquestionably timely filed for this purpose.

To be sure, Petitioners seek review so that this Court may clarify the law and correct the errors which led the court below to enter that erroneous judgment. These include the grossly inappropriate refusal by the court of appeals -- ostensibly applying the "law of the case" doctrine to an earlier decision rendered under different factual circumstances[1] -- to

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[1]We agree with Respondents that we "'made clear [our] intention to raise questions about the discriminatory effect of the use of the Texas Index as an admissions sorting device'" in briefing the first appeal (Br. Opp. at 17, quoting Pet. at 26). The panel on the first appeal did not hold, explicitly or implicitly, that intervention could not be justified for the purpose of assuring that this evidence was presented. Rather, its decision implied precisely the opposite -- because the panel affirmed the trial judge's denial of intervention based upon its assumption that intervention was unnecessary to assure that the evidence would be introduced:

> Although the BPLA and TMLS may have ready access to more evidence than the State, we see no reason they cannot provide this evidence to the

reach the merits of Petitioners' appeal from the district court's denial of their second request to intervene in the action.[2]

> State. The BPLA and the TMLS have been authorized to act as *amicus* and we see no indication that the State would not welcome their assistance. BPLA and TMLS have not met their burden of demonstrating that they have a separate interest that the State will not adequately represent. The proposed intervenors have not demonstrated that the State will not strongly defend its affirmative action program. Nor have the proposed intervenors shown that they have a separate defense of the affirmative action plan that the State has failed to assert. *See, Jansen v. Cincinnati*, 904 F.2d 336 (6th Cir. 1990).

(App. 98a-99a.) Following this action by the first panel, the State refused to present the evidence questioning the validity of the Texas Index as an admissions criterion. The propriety of denying intervention under these circumstances -- diametrically opposite those anticipated by the first panel -- therefore had never been ruled upon by the first panel and the second panel's refusal to consider the issue on the ground of "law of the case" was patently in error.

[2]Petitioners believe that the application of the "law of the case" doctrine by the court below "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." S. Ct. R. 10.1(a).

But the approach of the panel below also reflected the established and incorrect Fifth Circuit standard for determining whether proposed intervenors' interests will be adequately represented by existing parties. The court of appeals' holding that Texas' refusal to introduce the evidence proffered by Petitioners did not amount to sufficient "changed circumstances" justifying intervention flowed directly from its adherence to the requirement that proposed intervenors must demonstrate "that the present parties *will* inadequately represent the proposed intervenors' interests" (App. 72a n.59 [emphasis added]). That standard, of course, is inconsistent with the principles announced in *Trbovich*[3] and followed by many other Circuits. The fact that the decision in Petitioners' appeal from the first denial of intervention rested principally upon this same incorrect legal standard hardly insulates it from correction by this Court in these proceedings.

Considering and correcting that legal error in the course of reviewing the 1996 judgment of the court of appeals will not involve retrospective reopening and reversal or modification of the earlier 1994 judgment, even assuming *arguendo* that it was a "final" order requiring immediate appeal.[4] Hence,

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[3]*Trbovich v. United Mine Workers*, 404 U.S. 528 (1972).

[4]*See* Br. Opp. at 14-16, noting unsettled state of the law on this question. This Court need not resolve the question in order to decide this case.

there is no jurisdictional impediment preventing this Court's review of the intervention question decided below.

2. ***Conflict among the Circuits.*** Respondents assert that we have manufactured a conflict among the Courts of Appeals about the standard to be applied in judging adequacy of representation where intervention is sought on the same side of an action on which a governmental agency is a party. They imply, for example, that the Ninth Circuit now follows the more stringent *parens patriae* presumption of adequacy, citing *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1498-99 (9th Cir. 1995). The distinction between the approach of the Ninth Circuit panel and that of the court below could not be greater, however.

The Ninth Circuit court begins its consideration of adequacy of representation by recognizing that a proposed intervenor's "burden in showing inadequate representation is minimal: it is sufficient to show that representation *may* be inadequate. *Trbovich v. United Mine Workers* [citation omitted]." 66 F.3d at 1498. While the court goes on to recognize that "'a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee,'" [citations omitted], it holds that the presumption is no more difficult to overcome than it would be to meet the general rule of *Trbovich*.

In the Ninth Circuit's view, a demonstration that the interests of the proposed intervenors are not identical with the general public interest that the governmental agency must uphold suffices to "satisf[y] the minimal showing required that the Forest Service *may* not adequately represent their interests in defending against the issuance of a broad injunction," 66 F.3d at 1499 [emphasis supplied]. The trial court's denial of intervention was reversed because "[t]he Forest Service is required to represent a broader view than the more narrow, parochial interests of the State of Arizona and Apache County." *Id. Accord*, *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1478 (11th Cir. 1993)("the intervenors sought to advance their own interests in achieving the greatest possible participation in the political process. Dade County, on the other hand, was required to balance a range of interests likely to diverge from those of the intervenors. . . . These divergent interests created a risk that Dade County might not adequately represent the applicants").[5]

Thus, there is a real and significant difference in approach among the Courts of Appeals on the standard for intervention that warrants this Court's review.

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[5]We apologize to the Court for the typographical error at p. 19 of the Petition, at which this case was cited. The pinpoint citation should have read "1477-78" rather than "n.77-78."

3. ***The relevance of petitioners' evidence about the Texas Index.*** Respondents attempt to minimize the significance of the evidence about the Texas Index's invalidity by characterizing it as "quixotic" (Br. Opp., at 19 n.10) and citing three cases for the proposition that "the use of an invalid test *does not* justify subsequent race-conscious decision-making to 'remedy' the use of the invalid test." *Id.* [emphasis in original]. However, each of the decisions cited by Respondents recognized that following a demonstration that a test or other selection process was invalid and had a discriminatory effect, race-conscious relief is proper until valid, nondiscriminatory procedures can be implemented. Each of the cited decisions condemned as not "narrowly tailored" the continued, long-term use of race-conscious measures by public agencies that exhibited no interest in developing and validating new selection criteria.

See Aiken v. City of Memphis, 37 F.3d 1155, 1164 (6th Cir. 1994) (*en banc*) ("over 15 years ago the City stipulated that it is 'currently in the process of developing' such procedures, and that 'development of fully validated processes is two to three years from accomplishment' . . . Yet, incredibly, the City continues to make police and fire department promotions according to procedures that have not been validated as racially neutral. This dereliction cuts against a finding that the race-based remedies at issue here are narrowly tailored"); *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994) ("The goal of eliminating discrimination may

justify some interim use of affirmative action, but affirmative action selection provisions are themselves a form of discrimination that cannot continue forever. An end to racial discrimination demands the development of valid, non-discriminatory selection procedures to replace race-conscious selection procedures. . . . [T]he single most important race-neutral alternative contained in the decrees was the requirement that the Board develop and put in place non-discriminatory selection procedures--a requirement that the Board has not satisfied"); *Billish v. City of Chicago*, 989 F.2d 890, 894-95 (7th Cir.) (*en banc*) ("Of course if the city had a desperate need for twenty captains just then, and the only eligibility list it had was based on a quite possibly biased examination that had been given in 1979, a modest departure in favor of remedial racial balance might well be justified. . . . But the record does not reveal whether the city had an urgent need for twenty captains and thus could not await the administering and scoring of an unbiased exam"), *cert. denied*, 114 S. Ct. 290 (1993).

Thus, far from being "quixotic," Petitioners' evidence, if it had been presented to the trial court, would have justified race-conscious relief until truly nondiscriminatory admissions criteria could be developed by the University of Texas Law School.

4. ***Reversal of the judgment below will not require this Court to decide issues other than those raised in the Petition.*** In a final attempt to complicate this matter, Respondents assert that if this Court grants review,

it will be required "to resolve numerous fact-specific questions not passed upon by the lower courts" (Br. Opp., at 20). None of those questions was answered by the court of appeals, and the answer to none of those questions was articulated by the panel as the basis for its judgment. This Court therefore need not deal with any of those questions in order to correct the legal errors by the court below that *did* undergird its judgment.

Conclusion

For the reasons stated herein, as well as those given in the Petition, the Writ of Certiorari should be issued.

Respectfully submitted,

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